Supreme Court of the United States

October Term, 1973

NO. 73-568

RALPH H. LITTLEJOHN, JR.,
Petitioner,

v.

SHELL OIL COMPANY, SOONER OIL COMPANY, AND AMERICAN OIL COMPANY,
Respondents.

Supplement to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Ralph H. Littlejohn Jr., Petitioner, respectfully files this Supplement to his Petition for Writ of Certiorari.

Subsequent to the printing of said Petition, the United States Courts of Appeals, Seventh Circuit, and Ninth Circuit, published opinions fundamentally inconsistent with each other and with the opinion of the Court of Appeals *En Banc* below. The opinions in *Copp Paving Co.* v. *Gulf Oil Co.*, ___ F.2d ___ (No. 72-2152, 9 Cir., Oct. 3, 1973) and *Mayer Paving &*

Asphalt Co. v. *General Dynamics Corp.*, __ F.2d __ (No. 72-1613, 7 Cir, Oct. 1, 1973) [Mr. Justice Clark sitting by designation], demonstrate further the abiding misunderstanding and conflicting applications of the Robinson-Patman Act, Section 2(a), and *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

1. The majority in *Mayer Paving* held that Section 2(a) jurisdiction is satisfied by interstate "underwriting" of purely local price discrimination in primary-line cases, such as *Moore* and *Littlejohn*, but is not satisfied in secondary-line cases. Justice Clark, in dissent, said that the underwriting concept applies to all Robinson-Patman Act cases, primary-line and secondary-line.

In *Mayer Paving*, the Court commented on the panel decision in *Littlejohn*:

> We do not find plaintiffs' reliance on *Littlejohn* v. *Shell Oil Co.*, persuasive. That case involved what one commentator has called "indirect primary-line competition," Case Comment, 37 *Minn. L. Rev.* 1035, 1040 n. 26 (1973). The Court was concerned with the "underwriting" theory found in the general language in *Moore*, discussed above. Here, there is no allegation that the buyers who allegedly received lower, non-justified prices were related to General Dynamics in any way similar to the manner in which gasoline stations were related to Shell Oil and American Oil in the *Littlejohn* case.

The Court thereupon ruled that the "interstate underwriting" concept described in *Moore, supra, was* a proper predicate for jurisdiction in primary-line cases, such as *Littlejohn*, but did not apply in secondary-line cases, such as was before the Court. Judgment was therefore rendered for General Dynamics.

Justice Clark strongly dissented. Justice Clark, in the same vein as Littlejohn has urged, said:

> This is the first dissent that I have filed in my several sittings with this Circuit, and it is, therefore, with regret that I find myself in disagreement here. However, the appellant, Mayer Paving and Asphalt Company, has been deprived of a $498,204.00 verdict and judgment by the granting of a motion *non obstante veredicto*, and, in my judgment, the sole ground for such precipitous action is entirely unsupportable. Indeed, if finally sustained, it will operate as a repealer of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), and will severely restrict the holding in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

While the majority recognized the *Moore*, *supra*, mandated application of the "underwriting" concept to primary-line cases, Justice Clark vigorously added:

> The majority also adopts the argument of General Dynamics that *Moore* v. *Mead's Fine Bread Co.*, *supra*, is inapposite because it involved primary competition between Moore and Mead. I find nothing in § 2(a) that limits its coverage to primary competition cases. On the contrary, the Act's purpose was to prevent all discriminatory pricing "where the effect of such discrimination may be substantially to lessen competition . . .". That interstate competition was substantially lessened in the particular geographical situation involved here is without peradventure; that the discriminatory pricing, in the words of § 2(a) "injured, destroyed or prevented" Mayer from competing with "customers" of General Dynamics located

> in Indiana was found to be true by the jury and was embodied in the judgment entered by the court and now set aside. Section 2(a) says nothing about "primary" or "secondary" lines of competition. Its intent, as stated by its manager, Congressman Utterback, was to condemn all discriminatory pricing "injuring" interstate commerce. To distinguish this case on technical differences between primary and secondary competition is but an arbitrary distinction entirely without a difference on these facts. Rather than excepting from § 2(a) the customers of the seller — as the majority does unless they are competing with one another — for the purposes of determining the presence of interstate commerce — § 2(a) *specifically* includes them and in the peculiar factual situation here requires, insofar as commerce is concerned, no proof of existing competition among the customers of the same seller. When it comes to the assessment of damages, competition might be crucial. While the factual situation was different in *Mead's Fine Bread*, where the interstate operation afforded a treasury for destroying local competition, the thrust of *Mead's Fine Bread* also covers this case. Indeed, in *Mead* it was admitted that the Act covered situations where "interstate commerce is in some other way used to destroy competition or is injured or impaired by a result of unlawful acts." 348 U.S. 115, 119. Here interstate commerce was used and unlawful acts were perpetrated in a continuous pattern for over ten years in sales made in interstate commerce that not only lessened competition but injured, destroyed or prevented Mayer from competing.

Thus, under the views expressed by both the majority and Justice Clark, Littlejohn satisfied the jurisdictional requirement.

Mayer Paving is in direct conflict with the *en banc* decision below in *Littlejohn.*

2. In *Copp Paving*, the Ninth Circuit distinguished the *en banc* decision in *Littlejohn.* The Court held that, while delivery of goods purchased must ordinarily cross State lines, it is not so required when there is some other nexus with an "instrumentality of interstate commerce."

Copp Paving is a consolidated proceeding, referred to as the Western Liquid Asphalt cases, brought under the Sherman, Clayton and Robinson-Patman Acts. The Court considered the Robinson-Patman Act jurisdictional matter after holding that the sales of asphalt affected "commerce", for Sherman Act purposes, because the asphalt was used on interstate highways.

The Court noted that defendants "process California-produced materials and deliver all of their product to California construction sites." Nevertheless, it was concluded that the "purchases . . . in commerce" Robinson-Patman Act jurisdictional requirement was satisfied. The Court said:

> Plaintiffs asserted claims under the Clayton and Robinson-Patman Acts as well as under the Sherman Act. Section 3 of the Clayton Act prohibits tying arrangements by "any person engaged in commerce." For there to be jurisdiction under the Clayton Act § 7, both the "acquired" and the "acquiring" companies must be "in commerce." Robinson-Patman price discrimination jurisdiction depends on the sales involved, as well as the selling company being "in commerce." Defendants argue that the "in commerce" requirements of these statutes are satisfied only by sales which cross state lines. While recognizing that this position has recently been adopted by another circuit with respect to the Robinson-Patman Act, it

> should be noted that the court there did not consider, because the facts did not require it to, whether this state-line test also applies to sales of a commodity (such as asphalt used in the construction of interstate highways) which is itself closely linked to an instrumentality of interstate commerce. *See Littlejohn v. Shell Oil Co.*, 42 U.S.L.W. 2114 (5th Cir. Aug. 10, 1973) (en banc). *We see no reason why sales which are "in commerce" because of their nexus with an instrumentality of interstate commerce must also satisfy a state-line test of "in commerce."* To be sure, the statutory language of the Clayton and Robinson-Patman Acts is not as broad and flexible as that of the Sherman Act. *Nevertheless, the fact that these acts were intended to supplement the purpose and effect of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three acts. See United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Standard Fashion Co. v. Mangrane-Houston*, 258 U.S. 346 (1922). *See also* Conference Rep. H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936). Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are "in" commerce but must show that competition was injured before the Court has jurisdiction. This is the result of confusing the substantive with the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it. [Emphasis added.]

Copp Paving therefore modified the "crossing State-line rule" so as to require its application *only* where there is no other link to an instrumentality of interstate commerce.

The result in *Copp Paving* was that Robinson-Patman Act

jurisdiction was held to exist even though no asphalt was delivered across State lines, a result fundamentally inconsistent with the result reached by the Fifth Circuit below.

CONCLUSION

It has been many years since the jurisdictional requirements of the Robinson-Patman Act were considered by the Supreme Court. In addition to the reasons for review mentioned in the Petition for Writ of Certiorari, there is a further need to reconcile the widening conflict among the Circuits.

Petitioner therefore prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

Original Signed By
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CERTIFICATE OF SERVICE

I, JAY M. VOGELSON, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Supplement to Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mails, postage prepaid, on November 2, 1973, addressed to William Simon, Esq., 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006 and D. L. Case, Esq., First National Bank Building, Dallas, Texas 75202, counsel for Shell; to Matthew J. Gallo, Esq., 910 South Michigan Avenue, Chicago,

Illinois 60680 and Khent H. Rowton, Esq., 2001 Bryan Tower, Dallas, Texas 75201, counsel for American; and to Charles H. Gullett, Esq., Citizens National Bank Building, Denison, Texas, counsel for Sooner.

Original Signed By
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